anc.law.ecf@alaska.gov

IN THE SUPREME COURT FOR THE STATE OF ALASKA

SUNNY GUERIN, ELIZABETH ASISAUN TOOVAK, and VERA LINCOLN, Appellants, v. KEVIN MEYER, in his official capacity as Lieutenant Governor of the State of Alaska; GAIL FENUMIAI, in her official capacity as the Director of the Alaska Division of Elections, and the STATE OF ALASKA, DIVISION OF ELECTIONS, Appellees.	)	Supreme Court Case S-18457

Superior Court Case No. 3AN-22-06795 CI

STATE'S SUPPLEMENTAL MEMORANDUM

Alaska's seat in the U.S. House of Representatives has been vacant since the March 18, 2022 death of Congressman Don Young. In the special primary election held June 11, voters selected the top four candidates eligible to proceed to the August 16 special general election. On June 21, one of the top four candidates—Al Gross—withdrew. The appellants filed this case seeking to compel the Division to replace him on the special general election ballot with Tara Sweeney, who received the fifth highest number of votes. But because the statute allows fifth-place candidates to appear on the ballot only if a candidate "dies, withdraws, resigns, becomes disqualified, . . . or incapacitated . . . after the primary election and 64 or more days before the general election," the superior court properly concluded that the Division cannot place Ms.

Sweeney on the ballot. This Court should swiftly affirm the superior court's ruling, clearing the way for the Division to finalize the ballot design for the August 16 combined special general and regular primary election by Tuesday, June 28 at noon.

BACKGROUND

The facts that led to this lawsuit are undisputed and described in the Division's brief below. One of the four candidates who received the most votes in the June 11 special primary election, and thus became eligible to advance, withdrew on June 21. In response to an inquiry from another top-four finisher, the Division explained that the statute, AS 15.25.100(c), does not authorize replacing a withdrawn top-four finisher unless the withdrawal occurs at least 64 days before the special general election. Dr. Gross withdrew 56 days before the special general election. The Division therefore could not replace him with Ms. Sweeney.

The plaintiffs filed suit asking the superior court to order the Division to make the substitution. Because the complaint raised only questions of law, the parties filed expedited cross-motions for summary judgment and the superior court issued a decision shortly after oral argument this morning, upholding the Division's determination that Dr. Gross withdrew too late to be replaced by the fifth place candidate. The plaintiffs have now filed an emergency appeal in this Court.

ARGUMENT

I. The plain language of the statute clearly prohibits the substitution.

As the superior court correctly recognized, the plain language of the elections statutes forecloses replacing Dr. Gross with Ms. Sweeney. The Division laid out its

interpretation of the controlling statutes in detail in its superior court brief. In short, the statutes create a default rule—"the director shall place on the general election ballot *only* the names of the four candidates receiving the greatest number of votes for an office"[1]—and a few narrow exceptions, "[e]xcept as provided in (b)--(g) of this section, ..."[2] Subsection (c)—the exception relevant here—tells the Division when to replace a top-four candidate with a fifth-place candidate: "if a candidate nominated at the primary election dies, withdraws, resigns, becomes disqualified from holding office for which the candidate is nominated, or is certified as being incapacitated . . . after the primary election and *64 or more days before the general election*," the fifth-place replacement should be made.[3] Because Dr. Gross withdrew only 56 days before the special general election the Division cannot substitute the fifth-place finisher for him on the special general election ballot.

The appellants concede that AS 15.25.100(c) applies to a special general election, as they must, given that no other authority for a fifth-place candidate replacement exists anywhere. Yet they argue that just one small piece of that statute—the 64-day deadline in

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1 AS 15.25.100(a) (emphasis added); *see also* AS 15.25.010 (similarly providing that unless an exception is met, "only the four candidates who receive the greatest number of votes for any office shall advance to the general election"). Instead of citing subsections (b)--(g) of AS 15.25.100 as possible exceptions to this rule, AS 15.25.010 cites only subsection (d), which concerns candidates for governor and lieutenant governor. This appears to be a drafting oversight. But a strict reading of AS 15.25.010 would mean that candidate substitutions are only ever possible in governor and lieutenant governor races, not that they are available more freely.

2 AS 15.25.100(a).

3 AS 15.25.100(c) (emphasis added).

subsection (c)—does *not* apply to special elections. [Pl. MSJ at 6-7] But a specific statute—upon which appellants rely—makes clear that AS 15.25.100 must apply in its entirety to special elections. Alaska Statute 15.40.220 instructs that "[u]nless specifically provided otherwise, *all* provisions regarding the conduct of the primary election and general election shall govern the conduct of the special primary election and special election of the United States senator or United States representative . . . ." (Emphasis added). Because nothing in AS 15.25.100 "specifically provide[s] otherwise," the plain text of AS 15.40.220 makes all of AS 15.25.100 applicable to special elections. And the provision must apply in full or not at all. If it applies, the timing part applies; the Division cannot cherry-pick the candidate replacement authority from AS 15.25.100(c) while disregarding the 64-day deadline imposed by the same statute.

Alaska Statute 15.40.220 goes on to list some examples of the types of provisions that apply to special elections.[4] The plaintiffs argued—in their complaint and at oral argument before the superior court—that the absence of the word "deadlines" on that list creates a "specific" exclusion such that none of the statutory deadlines apply to special elections, and the Division is supposed to simply make up all deadlines from scratch. [Pl. Compl. at 5] This reading of AS 15.40.220 disregards the text, ordinary interpretation

[4] AS 15.40.220 (". . . including provisions concerning voter qualifications; provisions regarding the duties, powers, rights, and obligations of the director, of other election officials, and of municipalities; provision for notification of the election; provision for payment of election expenses; provisions regarding employees being allowed time from work to vote; provisions for the counting, reviewing, and certification of returns; provisions for the determination of the votes and of recounts, contests, and appeal; and provision for absentee voting.").

principles, and common sense. "*[A]ll* provisions regarding the conduct of" regular elections apply to special elections, "[u]nless specifically provided otherwise."[5] The legislature's rules for interpreting its statutes confirm that lists introduced with the word "including"—like the list in AS 15.40.220—are not to be read as exhaustive.[6]

And in any event, AS 15.25.100 is one of the types of statutes listed. The provisions that apply to special elections "includ[e]," among several others, "provisions regarding the duties, powers, rights, and obligations of the director." Alaska Statute 15.25.100(a) and (c) articulates duties of the director: she "shall place on the general election ballot only the names of the four candidates receiving the greatest number of votes for an office," and she "shall" fill a vacancy with the fifth-place vote getter but only when a top-four candidate withdraws by the deadline.

In addition to misreading AS 15.40.220 as an exhaustive list, the plaintiffs argue that AS 15.40.140 is a specific deadline provision that operates to exempt special elections from all deadlines found in the statutes. But AS 15.40.140 simply sets the range of dates within which special elections must be scheduled. It says nothing about any other deadlines, and does not "specifically provide" that special elections are exempt from statutory deadlines that apply by operation of AS 15.40.220. Most importantly, AS 15.40.140 provides no alternative to the 64-day replacement deadline in

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5 AS 15.40.220

6 AS 01.10.040(b) ("When the words 'includes' or 'including' are used in a law, they shall be construed as though followed by the phrase 'but not limited to.'"); *see also Millette v. Millette*, 240 P.3d 1217, 1220 (Alaska 2010) (quoting same).

AS 15.25.100(c). And plaintiffs identify no other source of a candidate replacement deadline.

One more statute that was part of Ballot Measure 2 removes any remaining doubt that the 64-day candidate replacement deadline applies to special elections, not just regular ones. Alaska Statute 15.58.020(c)(2) tells the Division what to print in official election pamphlets and requires a statement mentioning the 64-day deadline in the pamphlet for "a *special primary* election."[7] The statute obviously would not require the Division to inform voters about the 64-day replacement deadline in the context of a special election if this deadline did not apply to special elections. The appellants point out that no election pamphlet was required for this election, and therefore argue that the statute does not answer the question of whether the 64-day replacement deadline applies to *this* special election. But the reason no pamphlet was required here is because this election does not include a ballot proposition.[8] The presence or absence of a ballot proposition has no significance to the applicability of the candidate replacement deadline.

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[7] (Emphasis added.) The required statement for election pamphlets for special primary elections discusses candidates for "a state office or United States senator," but omits mention of candidates for United States representative. This also appears to be a drafting error rather than an intentional choice. There is no reason, given the plain text of AS 15.25.100(c), to think fifth-place finisher substitutions were intended for special elections of United States senators but not representatives. The immediately preceding election pamphlet subsection, AS 15.58.020(c)(1), requires discussion of the fifth-place substitution in primary elections for both a senator and a representative.

[8] Because there is no ballot proposition on this special general election ballot, no pamphlet is required here. AS 15.58.010 (requiring an election pamphlet "before each . . . special . . . election at which a ballot proposition is scheduled to appear on the ballot.") Nevertheless, the statute plainly contradicts the plaintiffs' argument that the 64-day replacement deadline was not intended to apply to special elections. There is absolutely

This Court has recognized the "normally salutary doctrine that election deadlines must be strictly construed and strictly enforced," departing from this doctrine only in cases of ambiguity and adhering to it when faced with deadlines that "cannot reasonably be considered ambiguous or impossible to comply with."[9] The statutory deadline here is neither ambiguous nor impossible to comply with. The Division would have substituted the fifth-place candidate for Dr. Gross if he had withdrawn before Monday, June 13, 64 days before the August 16 special general election.

II. The Division did not ignore other statutory deadlines, and even if it had, that would not justify violating the statutory deadline here.

The appellants argue that the Division changed or somehow violated other statutory deadlines, in an attempt to support their theory that no deadlines apply to special elections. But the Division did not change or violate any statutory deadlines here. The first deadline appellants offer as an example is the June 1 candidate filing deadline in AS 15.25.040, which says declarations are filed "June 1 of the year in which a general election is held for the office." Unlike the 64-day deadline, June 1 is a deadline set on a particular calendar day designed to fit with a consistently timed regular primary election,

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no reason to think the applicability of the 64-day candidate replacement deadline turns on the presence or absence of a ballot proposition on the ballot in question.

[9] *See State v. Jeffery*, 170 P.3d 226, 234-35 (Alaska 2007) (quoting *Silides v. Thomas*, 559 P.2d 80, 86 (Alaska 1977)).

which always occurs on the third Tuesday in August in even numbered years.[10]

But special elections may happen at any time of year, including in April or May.[11] Obviously the June 1 filing deadline cannot apply to an election that happens before June 1. The June 1 calendar deadline is a rare provision in the statutes that on its face applies exclusively to regular elections that occur at statutorily mandated times, not to special elections that might fall during any time of year. The statutes that address special primary elections do not provide a candidate-filing deadline, so the Division was free to set a reasonable deadline of April 1. See AS 15.40.180.

The second deadline appellants identify is the deadline in AS 15.07.140, which requires the Division to have the list of registered voters in a usable electronic format 120 days before the general election. The Division complied with this deadline. The appellants' argument appears to rest on the assumption that a special general election occurs less than 120 days after the event that triggers it, whether it be the death or resignation of the incumbent. But this is not the case. Under the statute, a special general election will always occur at least 120 days and not more than 150 days after the triggering event. So there is nothing problematic about this statutory deadline; and nothing in the record supports any suggestion that the Division did not comply with it.

The fundamental problem with appellants' argument is that, even if the Division had violated some other statutory deadline, such a violation would not require the

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10 AS 15.25.020

11 AS 15.40.140.

Division to ignore all other election deadlines as well. The appellants fail to explain how the Division's alleged failure to adhere to these other deadlines necessitates ignoring the candidate replacement deadline. The Division does not have the discretion to ignore any statutory deadline.

III. The Division's failure to publicize the replacement deadline does not create some unspecified "notice" problem.

The appellants argue that because the Division did not include the 64-day candidate replacement deadline in its list of deadlines, people expected that it would not apply, and that the Court should therefore order the Division not to apply it as a remedy for those violated expectations. The appellants point to "an initial, rough timeline of dates" provided by the Division in a press briefing announcing the special election, which laid out a series of dates relevant to the special primary election. [Ex. A to MSJ] They assert that because this "initial, rough timeline" did not include the candidate replacement deadline for the general election, the Division cannot apply that deadline. No legal authority supports this argument.

The first problem with this argument is that the candidate replacement deadline is a deadline for the *special general* election, not a deadline for the special primary election. The timeline the appellants rely covers only the special primary election, so the omission of the candidate replacement deadline, which applies to the special general election, is hardly surprising or significant. Moreover, the candidate replacement deadline, unlike every other date in the timeline, only occasionally has any importance. The absence of AS 15.25.100(c)'s deadline from an informal press briefing hardly creates any reasonable

expectation in anyone that the Division would ignore that statute.

But even if this timeline could have misled anyone on this point, such confusion would not invalidate a statutory deadline. The appellants appear to believe that candidates or voters have some vested right or interest in having a candidate's withdrawal lead to a replacement, but no legal authority supports this claim. Moreover, the only person who could conceivably have acted differently had he been aware of this deadline—for example, by looking at the relevant election laws—is Dr. Gross. And, contrary to the appellants' suggestion, candidates do not have the right to engage in an entirely strategic withdrawal from a special election, forcing themselves to be replaced despite having won more votes than the fifth-place finisher. Perhaps Dr. Gross would have chosen not to withdraw if he had understood that Ms. Sweeney could not replace him. But a top-four candidate has no right to decide that they would actually prefer the fifth place candidate to advance and drop out in order to effect that preference. Applying the deadline infringes no right of any candidate or voter.

CONCLUSION

The superior court correctly applied the plain language of AS 15.25.100(c) in holding that Dr. Gross withdrew from the special general election too late to be replaced on the ballot by the fifth place finisher in the special primary; and this Court should affirm its decision.

DATED June 24, 2022.

TREG R. TAYLOR
ATTORNEY GENERAL

By: /s/ *Katherine Demarest*
Katherine Demarest
Alaska Bar No. 1011074

Thomas Flynn
Alaska Bar No. 1910085

Laura Fox
Alaska Bar No. 0905015
Assistant Attorneys General